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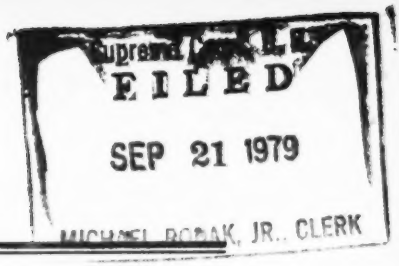

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

WILLIAM HANCOCK and
PAUL A. PALOMBI,
Petitioners,
v
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

HOWARD S. SIEGRIST
31811 Middlebelt Road
Farmington Hills, Michigan 48043

Interstate Brief & Record Co., Wurlitzer Bldg., 1509 Broadway, Detroit, MI 48226
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

William Hancock and Paul Palombi, by and through their attorney Howard S. Siegrist, petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit affirming the conviction of William Hancock and affirming the District Court's order denying Paul A. Palombi's motion

to vacate his conviction, and denying Petitioners subsequent Petition for Rehearing, requesting the vacation of their respective convictions, both of which involve alleged violations of 42 USC Section 1396h(b)(1) (Medicaid) (1972).

OPINION BELOW

The principal Opinion of the Seventh Circuit Court of Appeals was decided and filed July 9, 1979, and has not to date been reported to Petitioner's knowledge, and is reprinted in full as Appendix A hereto; the Order of the Seventh Circuit Court of Appeals filed August 24, 1979, denying Petitioners Petition for Rehearing is appended hereto as Appendix B.

JURISDICTION

The Order of the Seventh Circuit Court of Appeals of July 9, 1979 denied the specific relief prayed for in this Petition for Certiorari. The jurisdiction of this Court is invoked under 28 USC Section 1254(1). The Seventh Circuit Court of Appeals has rendered a decision in conflict with the decisions of the Second and Fifth Circuit Courts of Appeal on the same matter.

QUESTIONS PRESENTED

I.

WAS A CRIME COMMITTED AS A MATTER OF LAW, IN VIOLATION OF TITLE 42 UNITED STATES CODE, SECTION 1396h(b)(1) and 1395nn(b)(1) (1972) UPON ADMISSION BY THE DEFENDANTS (BY NOLO CONTENDERE OR OTHERWISE) OF ALL OF THE ALLEGATIONS CHARGING SUCH CRIME IN THE INDICTMENT?

II.

IS TITLE 42 UNITED STATES CODE, SECTION 1396h(b)(1) and 1395nn(b)(1) (1972) UNCONSTITUTIONAL AS DENYING DUE PROCESS OF LAW BECAUSE THE ELEMENT OF SPECIFIC INTENT IS NOT REQUIRED FOR CRIMINAL RESPONSIBILITY AND THE STATUTE IS VAGUE AND AMBIGUOUS?

STATEMENT OF THE CASE

The appeals of William Hancock and Paul A. Palombi arose from a series of indictments filed against several chiropractors on November 17, 1976, for soliciting and receiving kickbacks in Medicare and Medicaid cases, 42 USC Section 1395nn(b)(1) (Medicare) and 1396h(b)(1) (Medicaid) (1972) which was subsequently amended in 1977. In separate proceedings, each defendant entered a plea of nolo contendere to one count of his indictment and was adjudged guilty as charged in January, 1977.

The appeals were consolidated because both of the defendants raised challenges to the sufficiency of the indictments and the constitutionality of the statutes. The United States Court of Appeals for the Seventh Circuit held that the indictments sufficiently allege the crime of receiving a kickback under the former statute and that the kickback statutes were not constitutionally vague. The Court declined to follow *United States v. Porter* 591 F2d 1048 (5th Cir. 1979) to the extent its conclusions were inconsistent.

Both defendants contend that their conduct did not constitute a crime, and their respective indictments did not sufficiently allege the crime under Section 1396h(b)(1), together with the contention that Section 1396h(b)(1) is unconstitutional because it is vague and because it omits intent as an element of the crime.

The indictments allege the following conduct by the defendants. Defendants Hancock and Palombi are doctors of chiropractic licensed to practice in Michigan and Indiana, respectively. Between 1973 and 1975, the defendants used the services of a certain medical laboratory, Chem-Tech Laboratory of Fort Wayne, Indiana. The defendants obtained blood and tissue specimens from their patients and sent the specimens to Chem-Tech for testing. Along with the specimens, the defendants filled out and submitted test request forms, including billing information on the patient containing Medicare or Medicaid recipient numbers where applicable. Chem-Tech then billed the patient, his insurer, or, petinent to this case, the state agency handling Medicare and Medicaid funds. The indictments allege that the defendants "did solicit and receive kickbacks from Chem-Tech . . . for referring

specimens to Chem-Tech . . . ." The defendants claim the payments received from Chem-Tech were legitimate "handling fees" for the actual services of obtaining, packaging, and sending the samples, and then interpreting the results of the tests. The indictment labeled the payments "kickbacks" in violation of Section 1396h(b)(1).

The Second Circuit Court of Appeals in the case of *United States v. Zacher,* 586 F2d 912 (1978) declared Title 42, USC Section 1395h(b)(1) invalid; and the Fifth Circuit Court of Appeals in the case of *United States v. Porter,* 591 F2d 1048 (1979) with facts identical to those in the case at bar, declared the companion statute Title 42 USC Section 1395nn(b)(1) invalid.

REASONS FOR GRANTING THE WRIT

THE SEVENTH CIRCUIT COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH BOTH THE SECOND AND FIFTH CIRCUIT COURTS OF APPEAL.

I.

A CRIME WAS NOT COMMITTED AS A MATTER OF LAW, IN VIOLATION OF TITLE 42 UNITED STATES CODE, SECTION 1396h(b)(1) and 1395nn(b)(1) (1972) UPON ADMISSION BY THE DEFENDANTS (BY NOLO CONTENDERE OR OTHERWISE) OF ALL OF THE ALLEGATIONS CHARGING SUCH CRIME IN THE INDICTMENT.

The Petitioners-Appellants submit that if what the Government disguises as a "kickback" by words of an Indictment is in fact a valid "handling fee," there is no crime to which the Defendants can stand convicted, and

because a Defendant does not object to the words used by the Government in the Indictment, there can still be no crime if in fact one does not exist at law.

The Court of Appeals decision of July 9, 1979 states "the Indictments do allege corrupt payments which were admitted by the Defendant's pleas," stating further, "thus, the element of corruption is found in this allegation that the defendants received payments in return for their decision to send specimens to Chem-Tech." We take issue with this statement. If no crime exists at law as stated in *United States v. Zacher*, 586 F2d 912 (2nd Cir. 1978); and *United States v. Porter*, 591 F2d 1048 (5th Cir. 1979) then any remuneration paid by Chem-Tech to the Defendants was perfectly justified and legal at that time. The following statement of the Court of the potential for increased costs to the Medicare-Medicaid system was conjecture and had no basis in fact.

The Defendants-Appellants assert that what the Government would like to say is a "kickback" is in reality and as a matter of law, a valid handling fee not included within the *former* statute, and received by the physician in performing his service in the drawing, packaging and forwarding of the blood specimen to the laboratory for testing.

The Statute in question was never designed to be used in the manner as applied by the Government in the cases at bar. It was never intended as a sword against physicians for honestly and in good faith performing their services, and especially in the cases before this Court where the laboratory had assured the physicians that it was perfectly lawful for them to

accept these "handling fees" for their services in drawing, packaging and forwarding the blood samples for diagnostic evaluation. (Judicial Notice)

The United States Supreme Court in *United States v. Murdock*, 290 US 389, 78 L Ed 381, 54 S Ct 223 stated, "Congress did not intend that a person, by reason of a bonafide misunderstanding as to his liability for the tax, as a duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. And the requirement that the omission in these instances, must be willful, to be criminal, is persuasive that the same element is essential to the offense of failing to supply information." (394, 78 L Ed at 385)

The Court of Appeals in its opinion of July 9, 1979 states that it agrees with the Court in the *Zacher* case, *supra*, but the "indictments in this case adequately allege the crime of receiving kickbacks which Congress sought to proscribe in Sections 1395nn(b)(1); and 1396h(b)(1). However the Court fails to consider that the *Zacher* Court (Second Circuit Court of Appeals) declared the statute to be invalid after the defendants had been convicted under a similarly worded Indictment, a copy of which was furnished to the Seventh Circuit Court of Appeals subsequent to Oral Argument and made a part of the record herein by the Government, together with the *Porter* case Indictment, which consisted of some 34 pages and goes into great length and detail in describing handling fees as kickbacks and bribes.

The *Zacher* Court in declaring bribes and kickbacks not included within Congressional enactment of Section

1396h(b)(1) cites *Morrissette v. United States*, 342 US 246, 96 L Ed 288 (1952) which states:

> The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute. (342 U.S. at 263, 72 S Ct. at 249)

The *Zacher* Court stated at page 917 of its opinion tht "because there is no showing that 'bribe' in Section 1396h(b)(1) was intended to encompass more than at common law or in common usage, we hold Congress did not reach the receipt of payments such as those accepted by *Zacher*." We wish to note that footnote 9 of the *Zacher* opinion considers "bribe" and "kickback" words of common usage and the *Zacher* Court's interpretation of Section 1396h(b)(1) is in line with common usage, and in the Court's view makes grouping together of the three practices of Rebate, Bribe and Kickback in one prohibition, logical.

The Second Circuit in *United States v. Zacher, supra* reversed the judgment of conviction and remanded the case with instructions to dismiss the indictment, while specifically holding that the Defendant has not violated Section 1396h(b)(1) when he received "bribes" in connection with the furnishing of nursing home services to medicaid patients.

The facts of *United States v. Porter, supra*, cited by the Court of Appeals in its Opinion are almost identical in every respect with the case of the Appellants, with the exception that the *Porter* defendants were found guilty,

after a jury trial, of even the additional crimes of conspiracy to defraud the United States and mail fraud charges, by virtue of an even more comprehensive Indictment. The Seventh Circuit in the case at hand, in its opinion states, "To the extent our conclusions are inconsistent with the *Porter* case, we decline to follow it." (Page 4) The Appellant respectfully takes exception to this position of the Court.

In the *Porter* Case, the Fifth Circuit Court of Appeals reversed the judgments of conviction and remanded the case with instructions where several physicians and medical laboratory owners were charged and convicted of conspiracy to defraud the United States; mail fraud; and either offering or receiving kickbacks or bribes in connection with supplying medicaid services. The Indictment had specifically charged that the laboratory had received fees and shared them with the doctors who had referred specimens to them. The Court in dismissing the Indictment stated that the Indictment and trial failed to prove the commission of any crime denounced by Federal Statute. The Defendants in the *Porter* case had their laboratory corporation pay money to a dummy corporation who in turn then issued checks to the various Defendant physicians who had submitted blood specimens of medicaid patients to the laboratory, and the laboratory's corporation would receive monies for running the tests directly or indirectly through Medicaid.

The Fifth Circuit in its opinion stated at page 1054:

> Similarly, the acts alleged in the indictment did not consistute "kickbacks" within the meaning of 42 USC Sec. 1395nn(b). In ordinary parlance, a kickback is the secret return to an earlier

possessor of part of a sum received. As the Second Circuit in *Zacher, supra* interpreted the term in a similar statute, a kickback 'involve(s) a corrupt payment or receipt of payment in violation of the duty imposed by Congress on providers of services to use federal funds only for intended purposes and only in the approved manner.' 586 F2d at 916. Other Federal statutes which prohibit the offer, acceptance or solicitation of kickbacks are aimed at preventing the corruption of the judgment of a public official or of some individual who has a specific duty imposed upon any of these defendants by a statute or regulation, the violation of which would amount to a misapplication of federal funds. Therefore we can only conclude that no crime involving kickbacks has been *charged* or proven.

The Fifth Circuit Court of Appeals in reviewing Congressional intent regarding this particular Statute, in its opinion stated at page 1054:

> Our conclusion that 42 USC 1395nn(b) did not make criminal the acts charged in the indictment is strengthened if not absolutely compelled, by the events subsequent to the indictment period. In 1977 Congress amended Section 1395nn(b) and increased the penalties for violation of that statute to a fine of up to $25,000 or imprisonment for up to five years or both. At the same time, Congress completely changed the wording of the statute and made the description of the crime much more specific. The legislative history clearly indicates that the reason for this

> substantial alteration of the wording was the fact Congress and many United States Attorneys believed *'that the existing language of these penalty statutes (42 U.S.C. 1395nn and 1396h) is unclear and needs clarification.'* H.R. Rep No. 95-393 (II), 95 Cong., 1st Sess. 53 (1977), reprinted in (1977) U.S. Code Cong. & Admin. News, pp 3039, 3055.

The *Porter* Court in its remarks on page 1054 sums up the Appellants position herein where the Court states:

> If the meaning of the 1972 version of 42 U.S.C. 1395nn(b) was not clear and precise to the Congress and to United States Attorneys charged with enforcing the law, then we are hard put to say, with that degree of confidence required in a criminal conviction, that these defendants were given clear warning by that statute that their conduct was prohibited by it, thus amounting to a criminal act.

Nowhere did the Defendants-Appellants open up or control the payments to Chem-Tech laboratory, who billed Medicare or Medicaid for their services alone, and which would have been done whether or not a handling fee had been paid. Appellants do not agree that the Indictments allege corruption under the former statute with which they were charged, to which they plead nolo contendere. The Defendants-Appellants have always stood fast in their position that what they received as valid handling fees were perfectly lawful at that time.

II.

TITLE 42 UNITED STATES CODE, SECTION 1396h(b)(1) and 1395nn(b)(1) (1972) IS UNCONSTITUTIONAL AS DENYING DUE PROCESS OF LAW BECAUSE THE ELEMENT OF SPECIFIC INTENT IS NOT REQUIRED FOR CRIMINAL RESPONSIBILITY AND THE STATUTE IS VAGUE AND AMBIGUOUS.

The Court of Appeals in its "per curiam" opinion states (page 5) that the Statute gave the Defendants fair notice that their conduct was forbidden, citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). Appellants assert that this Section in so far as it makes it a crime without any element of intent is unconstitutional because it is vague, indefinite and denies due process of law.

The United States Supreme Court has repeatedly struck down and declared laws unconstitutional where they are vague and indefinite. (The Void for Vagueness Doctrine in the Supreme Court, 109 U of Pa L Rev 67 (1960))

The United States Supreme Court in *Buckley v. Valeo*, 424 US 1, 46 L Ed 2d 659, 96 S Ct 612, 721, stated:

> Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for 'no man shall be held criminally responsible for conduct which he could not reasonably understand to be prescribed.' *United States v. Harriss*, 347 US 612, 617; 98 L Ed 2d 110, 92 Sup Ct 808; See Also *Papchristou v. City of Jacksonville*, 405 US 156, 31 L Ed 2d 110, 92 S Ct 839 (1972).

The Supreme Court in *Wright v. Georgia*, 373 US 284, 10 L Ed 349, 83 S Ct 1240 (1963) stated that a generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissible and constitutionally impermissible applications of the statute.

In *Morissette v. United States, supra,* the Supreme Court reversed the conviction of the Defendant on the ground that criminal intent was an essential prerequisite for criminal liability under any of the alternatives stated in Section 641, and that the existence of such intent was not to be presumed as a matter of law, but was to be found upon a consideration of all of the circumstances, rather than upon the isolated act of taking.

In the *Papachristou Case, supra,* the United States Supreme Court declared unconstitutional a statute for being "void for vagueness" where the Statute failed to give a person of ordinary intelligence fair notice that his contemplated conduct was forbidden by the statute, and when it encouraged arbitrary and erratic arrests and convictions.

We respectfully submit the exact situations occurred in the case before this Court, as well as others, as in *Porter*. While the term "kickback" in the Indictment may have had an adverse connotation, it most certainly did not have such in the Defendants view when they were receiving these same "handling fees." There was

certainly no corrupt purpose at the time sought or shown in the Indictment. There was never any mental culpability in any of these cases sufficient to create criminal conduct without specific intent, or to give force and effect to an otherwise void and vague statute. To affirm these Defendants convictions in light of all of the circumstances therefore seems unjust.

CONCLUSION

It is therefore respectfully submitted that this Court should grant the Petition for a Writ of Certiorari to review the important questions posed by the case at bar where the Seventh Circuit Court of Appeals has rendered a decision in conflict with the Second and Fifth Circuit Courts of Appeals on the same matter.

Respectfully submitted,

HOWARD S. SIEGRIST
31811 Middlebelt Road
Farmington Hills, Michigan 48043

Dated: September 18, 1979

STATUTE INVOLVED

TITLE 42, Section 1396h Offenses and penalties states as follows, to-wit:

(a) Whoever

(1) knowingly and willfully makes or causes to be made any false statement or representation of a material fact in any application for any benefit or payment under a State plan approved under this subchapter,

(2) At any time knowingly and willfully makes or causes to be made any false statement or representation of a material fact for use in determining rights to such benefit or payment

(3) Having knowledge of the occurrence of any event affecting (A) his initial or continued right to any such benefit or payment, or (B) the initial or continued right to any such benefit or payment of any other individual in whose behalf he has applied for or is receiving such benefit or payment, conceals or fails to disclose such event with an intent fraudulently to secure such benefit or payment either in a greater amount or quantity than is due or when no such benefit or payment is authorized, or

(4) Having made application to receive any such benefit or payment for the use and benefit of another and having received it, knowingly and willfully converts such benefit or payment or any part thereof to a use other than for the use and benefit of such other person,

shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(b) Whoever furnishes items or services to an individual for which payment is or may be made in whole or in part out of Federal funds under a State plan approved under this subchapter and who solicits, offers, or receives any

(1) Kickback or bribe in connection with the furnishing of such items or services or the making or receipt of such payment, or

(2) Rebate of any fee or charge for referring any such individual to another person for the furnishing of such items or services

shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(c) Whoever knowingly and willfully makes or causes to be made, or induces or seeks to induce the making of, any false statement or representation of a material fact with respect to the conditions or operation of any institution or facility in order that such institution or facility may qualify (either upon initial certification or upon re-certification) as a hospital, skilled nursing facility, intermediate care facility, or home health agency (as those terms are employed in this subchapter) shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $2,000 or imprisoned for not more than 6 months, or both.

Aug. 14, 1935, c. 531, Title XIX, 1909, as added and amended Oct. 30, 1972, Pub. L. 92 603, Title II, 242 (c), 278 (b) (9), 86 Stat. 1419, 1454.

TITLE 42 reads in pertinent part, to the case at bar, as follows, to-wit:

(b) whoever furnished items or services to an individual for which payment is or may be made in whole or in part out of Federal funds under a State plan approved under this subchapter and who solicits, offers, or receives any —

(1) Kickback or bribe in connection with the furnishing of such items or services or the making or receipt of such payment. . .

Shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

APPENDIX A

OPINION

In the
United States Court of Appeals
For the Seventh Circuit

(United States of America, Plaintiff-Appellee, v. William Hancock and Paul A. Palombi, Defendants-Appellants. Nos. 77-1276 and 79-1161.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division. Nos. F-Cr-76-77 & F-Cr-76-79 — Jesse E. Wechbach, Judge.

Argued June 18, 1979 — Decided July 9, 1979

Before Fairchild, Chief Judge, Cummings and Tone, Circuit Judges.

PER CURIAM. These two appeals arise from a series of indictments filed against several chiropractors for soliciting and receiving kickbacks in Medicare and Medicaid cases, 42 U.S.C. §§ 1395nn(b)(1) (Medicare) and 1396h(b)(1) (Medicaid) (1972) (amended 1977).[1] In separate proceedings each defendant entered a plea of nolo contendere to one count of his indictment and was adjudged guilty as charged. These appeals have been consolidated because both of these defendants have

[1] The operative language of §§ 1395nn(b)(1) and 1396h(b)(1) is identical. The 1972 version of § 1396h(b)(1) read:

> (b) Whoever furnishes items or services to an individual for which payment is or may be made in whole or in part out of Federal funds under a State plan approved under this subchapter and who solicits , offers, or receives any —
>
> (1) kickback or bribe in connection with the furnishing of such items or services or the making or receipt of such payment . . .
>
> shall be guilty of a misdemeanor . . . .

raised challenges to the sufficiency of the indictments and the constitutionality of the statutes.[2] We hold that the indictments sufficiently allege the crime of receiving a kickback under the statutes and that the kickback statutes are not unconstitutionally vague.

I

Both defendants contend that their conduct did not constitute a crime. By pleading nolo contendere, however, the defendants have admitted the allegations in the indictments and waived all nonjurisdictional defects in the proceedings, including all defects in the indictments, other than sufficiency. *United States v. Michigan Carton Co.*, 552 F.2d 198 (7th Cir. 1977). Therefore, the issue raised by this contention is whether the indictments sufficiently allege the crime of receiving a kickback under § 1396h(b)(1).

Briefly, the indictments allege the following conduct by the defendants. Defendants Hancock and Palombi are doctors of chiropractic licensed to practice in Michigan and Indiana, respectively. Between 1973 and 1975, the defendants used the services of a certain medical laboratory, Chem-Tech Laboratory at Fort Wayne, Indiana. The defendants obtained blood and tissue specimens from their patients and sent the specimens to Chem-Tech for testing. Along with the specimens, the defendants filled out and submitted test request forms, including billing information on the patient containing Medicare or Medicaid recipient numbers where applicable. Chem-Tech then billed the

[2] Defendant William Hancock also raises several issues not raised by defendant Paul Palombi. Since Hancock's separate issues are governed by settled rules of law, they do not meet our criteria for publication and are being decided in an unpublished order. *See* Circuit Rule 35.

patient, his insurer, or, pertinent to this case, the state agency handling Medicare and Medicaid funds. Finally, the indictments allege that the defendants "did solicit and receive kickbacks from Chem-Tech . . . for referring Medicare and Medicaid recipients' blood and tissue specimens to Chem-Tech . . . ." The defendants claim the payments received from Chem-Tech were legitimate "handling fees" for the actual services of obtaining, packaging, and sending the samples, and then interpreting the results of the tests. The indictment labelled the payments "kickbacks" in violation of § 1396h(b)(1).

The defendants rely on two recent cases construing the terms "kickback" and "bribe" in §§ 1395nn(b)(1) and 1396h(b)(1). In *United States v . Zacher*, 586 F.2d 912 (2d Cir. 1978), the court held that payments charged by a nursing home operator above the amount reimbursed by Medicaid could not be characterized as bribes under § 1396h(b)(1). The court reasoned that the terms bribe and kickback have settled legal definitions which "involve a corrupt payment or receipt of payment in violation of the duty imposed by Congress on providers of service to use federal funds only for intended purposes and only in the approved manner." 586 F.2d at 916. The court found no corruption or breach of duty in Zacher's receipt of the payments from private parties.

In the present case, however, the indictments do allege corrupt payments which were admitted by defendants' pleas. As noted above, the indictments allege that the defendants received kickbacks "for *referring* Medicare and Medicaid recipients' blood and tissue specimens to Chem-Tech . . ." (emphasis added). Thus, the element of corruption is found in this allegation that the defendants received payments in

return for their decision to send specimens to Chem-Tech. The potential for increased costs to the Medicare-Medicaid system and misapplication of federal funds is plain, where payments for the exercise of such judgments are added to the legitimate costs of the transaction. We agree with the court in *Zacher* that these are among the evils Congress sought to prevent by enacting the kickback statutes and conclude that the indictments in this case adequately allege the crime of receiving kickbacks which Congress sought to proscribe in §§ 1395nn(b)(1) and 1396h(b)(1).

The defendants also rely on *United States v. Porter*, 591 F.2d 1048 (5th Cir. 1979), which involved a scheme quite similar to the one here. The Fifth Circuit held that the payments in that case were not bribes or kickbacks. One major distinction between *Porter* and this case is that *Porter* was an appeal after a trial in which the government introduced its evidence in support of the corruption or breach of any duty imposed upon the defendants by statute or regulation. Here, in contrast, we review only the sufficiency of the indictments themselves. And we have already concluded that the indictments allege corruption which the defendants admitted by their pleas.

The court in *Porter* also construed the term kickback to mean "the secret return to *an earlier possessor* of part of a sum received." (Emphasis in original.) 591 F.2d at 1054. We cannot agree that the term kickback is limited to a return of funds to an earlier possessor. The term is commonly used and understood to include "a percentage payment . . . for granting assistance by one in a position to open up or control a source of income," *Webster's Third New International Dictionary* (1966), and we think it was used in the statute to include such a

payment. Here, of course, the defendants were able to open up or control the payment of federal funds to Chem-Tech by sending Medicare or Medicaid patients' tissue specimens to Chem-Tech; and the indictment alleges that they were paid for doing so. To the extent our conclusions are inconsistent with the *Porter* case, we decline to follow it.[3]

II.

Both defendants also contend that § 1396h(b)(1) is unconstitutional because it is vague and because it omits intent as an element of the crime. The defendants' vagueness argument seems to focus on the use of the term kickback to define the crime. As explained in Part I, we believe that the term kickback has a commonly understood meaning. Therefore, the statute gave the defendants fair notice that their conduct was forbidden. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

Our earlier discussion is dispositive of the defendants' intent argument as well. The term kickback requires that the payment be received for a corrupt purpose, here, in return for referring specimens to Chem-Tech. This requirement of corruption is a sufficient requirement of mental culpability to withstand constitutional attack, especially in the context of Congress' regulation of the expenditure of enormous sums of federal funds under the Medicare and Medicaid programs. *See Morisette v. United States*, 342 U.S. 246 (1952).

For the reasons stated here and in the accompanying unpublished order, Hancock's conviction is affirmed; the district court's order denying Palombi's motion to vacate his conviction is also affirmed.

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[3] This opinion has been circulated among all judges of this court in regular active service. No judge favored a rehearing in banc on the question of the interpretation of "kickback."

APPENDIX B

ORDER

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 24, 1979

Before
Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge

United States of America, Plaintiff-Appellee, v. William Hancock and Paul A. Palombi, Defendant-Appellants. Nos. 77-1276 and 79-1161.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division. Nos. F-Cr-76-77 and F-Cr-76-79. Jesse E. Eschbach, Judge.

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by defendants-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.